MARQUIS AURBACH COFFING
BRIAN R. HARDY, Nevada Bar No. 10068
bhardy@maclaw.com
10001 Park Run Drive
Las Vegas, NV 89145
Telephone: 702-207-6096
Facsimile: 702-856-8908

DURIE TANGRI LLP
SONALI D. MAITRA
California Bar No. 254896 (*Pro Hac Vice to be submitted*)
smaitra@durietangri.com
TIMOTHY C. SAULSBURY
California Bar No. 281434 (*Pro Hac Vice to be submitted*)
tsaulsbury@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendant
ZYNGA INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

RENO DIVISION

CG TECHNOLOGY DEVELOPMENT, LLC, INTERACTIVE GAMES LIMITED, and INTERACTIVE GAMES LLC,

Plaintiffs,

v.

ZYNGA, INC.,

Defendant.

Case No. 2:16-cv-00859-RCJ-VCF

ZYNGA INC.'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 2

A. Plaintiffs' Direct Infringement Allegations Fail to State a Claim 2

1. U.S. Patent No. RE39,818 5

2. U.S. Patent No. 7,534,169....................7

3. U.S. Patent No. 6,899,628....................10

4. U.S. Patent No. 6,966,832....................12

5. U.S. Patent No. 6,979,267....................13

6. U.S. Patent No. 7,029,394....................15

7. U.S. Patent No. 8,342,924....................16

8. U.S. Patent No. 9,111,417....................17

9. Plaintiffs' Failure to Identify Any Actual Games That Allegedly Infringe Alone Warrants Dismissal 18

B. Plaintiffs' Indirect Infringement Allegations Fail to State a Claim....................19

C. Plaintiffs' Willful Infringement Allegations Fail to State a Claim....................22

III. CONCLUSION....................23

TABLE OF AUTHORITIES

Page(s)

Cases

Addiction & Detoxification Inst. L.L.C. v. Carpenter, 620 F. App'x 934 (Fed. Cir. 2015) 3

Antonious v. Spalding & Evenflo Cos., 275 F.3d 1066 (Fed. Cir. 2002) 19

Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476 (1964) 20, 21

Ashcroft v. Iqbal, 556 U.S. 662 (2009) .... passim

Atlas IP LLC v. Pac. Gas & Elec. Co., No. 15-CV-05469-EDL, 2016 WL 1719545 (N.D. Cal. Mar. 9, 2016) .... passim

Atlas IP, LLC v. Exelon Corp., No. 15 C 10746, 2016 WL 2866134 (N.D. Ill. May 17, 2016) .... passim

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) .... passim

Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754 (2011) 20

Hologram USA, Inc. v. Pulse Evolution Corp., No. 2:14-cv-0772-GMN-NJK, 2016 WL 199417 (D. Nev. Jan. 15, 2016) 4, 5

In re Bill of Lading Transmission & Processing Sys. Patent Litig., 681 F.3d 1323 (Fed. Cir. 2012) 3, 20, 21

In re Seagate Tech., LLC, 497 F.3d 1360 (Fed. Cir. 2007) 22

McRO, Inc. v. Disney Interactive Studios, Inc., No. 12-cv-10333-GW (C.D. Cal. Mar. 4, 2013) 18, 19

Silver State Intellectual Techs., Inc. v. FourSquare Labs, Inc., No. 2:12-cv-01308-GMN-PAL, 2013 WL 5437363 (D. Nev. Sep. 26, 2013) 20, 21

Southwall Techs., Inc. v. Cardinal IG Co., 54 F.3d 1570 (Fed. Cir. 1995) 21

Tannerite Sports, LLC v. Jerent Enters., LLC, No. 6:15-cv-00180-AA, 2016 WL 1737740 (D. Or. May 2, 2016) 5

U.S. Ethernet Innovations v. Cirrus Logic, Inc., No. 6:12cv366 MHS-JDL, 2013 WL 8482270 (E.D. Tex. Mar. 6, 2013) 22

Word to Info, Inc. v. Google, Inc.,
--- F. Supp. 3d ---, No. 15-cv-03486-WHO, 2015 WL 6126472 (N.D. Cal. Oct. 19, 2015) 22

Statutes

35 U.S.C. § 271 ....19, 21

Rules

Fed. R. Civ. P. 11 2

Fed. R. Civ. P. 12(b)(6) 22

I. INTRODUCTION

For decades, a patent plaintiff could allege nothing more than that it owned a patent and that defendant infringed that patent. With just these conclusory allegations, it was able to get past the pleadings stage. The reason for this, for why patent cases were exempted from the mandates of the Supreme Court's holdings in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 550 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), was Form 18 of the Appendix of Forms to the Federal Rules of Civil Procedure. Form 18 outlined barebones requirements for patent complaints and said that to allege infringement plaintiff need provide no more than "a statement that defendant has been infringing the patent 'by making, selling, and using [the device] embodying the patent.'" As a result, time-consuming and expensive discovery could proceed without any meaningful showing that the defendant actually infringed the patent. The potential for abuse was high.

This all changed in December of last year. On December 1, 2015, the Supreme Court abolished Form 18 pleading by amending the Federal Rules of Civil Procedure to abrogate the form, making clear that a patent plaintiff must follow the mandates of *Iqbal* and *Twombly* if it hoped to survive dismissal. Under this new standard, a complaint for patent infringement must allege more than that a particular product's operation is "consistent with" or renders "possib[le]" infringement. Instead, it must contain "some further factual enhancement" or an additional "factually suggestive" allegation that direct infringement is "plausible." *Twombly*, 550 U.S. at 556–57 & 557 n.5. Complying with this new standard means actually showing, in a sworn complaint submitted to the court, how the accused system might plausibly meet each claim limitation. As a recent decision on the issue explains: "factual allegations that do not permit a court to infer that the accused product infringes each element of at least one claim are ***not*** suggestive of infringement—they are merely compatible with infringement." *Atlas IP, LLC v. Exelon Corp.*, No. 15 C 10746, 2016 WL 2866134, at *5 (N.D. Ill. May 17, 2016).[1] "Because the failure to practice even a single element is all that separates innovation from infringement, there is always an obvious alternative explanation where a plaintiff does not allege facts about ***each*** element." *Id*. Failure to comply with the *Twombly* and *Iqbal* pleading standards can be fatal—where a plaintiff

[1] Emphasis supplied unless otherwise noted.

fails to cure its pleading deficiencies on amendment, the case may be dismissed ***with prejudice***. *See, e.g.*, *Exelon*, 2016 WL 2866134, at *5.

There are many good reasons for requiring facts supporting an actual inference of infringement at the pleadings stage. For example, it prevents a patent plaintiff from forcing a defendant into expensive discovery without having a genuine basis to file. It requires a plaintiff to make claims of infringement subject to Rule 11 by requiring that their allegations come in the form of a signed pleading—as opposed to in discovery served later in the case. And it allows for early and meaningful settlement without waste of judicial and party resources by giving the defendant full and complete information about a plaintiff's claim.

Thus, for good reason, plaintiffs here must state claims for infringement that are plausible on their face. Under this standard, plaintiffs' claims all fail. By and large, plaintiffs' allegations of infringement involve nothing more than a formulaic recitation of the elements of just one claim of a patent, combined with a set of seemingly arbitrary screenshots from one game. There is no explanation of how the screenshots could possibly show infringement of each claim element—and screenshots, without more, could not possibly do so for these claims. Many claim elements require hardware components (albeit, generic and functionally-claimed ones) as part of a networked architecture; thus, a screenshot of gameplay—which contains no information about the backend architecture, if any, used in providing that game—cannot possibly show infringement. And for many claims' elements, the complaint is entirely silent. What's more, rather than identify which of Zynga's dozens and dozens of games infringe, the complaint simply states—with respect to all eight patents—that "Zynga's [unidentified] social casino games" infringe. This cannot possibly meet the standards of *Iqbal* and *Twombly*. Plaintiffs' allegations of indirect and willful infringement are similarly vague, and plaintiffs' complaint therefore should be dismissed in its entirety.

II. ARGUMENT

Plaintiffs' infringement allegations are deficient in three fundamental respects:

A. Plaintiffs' Direct Infringement Allegations Fail to State a Claim

Prior to December 1, 2015, the Federal Circuit directed lower courts to evaluate direct patent infringement allegations under the standard set forth in Form 18 of the Appendix of Forms to the Federal

Rules of Civil Procedure, not by whether they satisfy the Supreme Court's more stringent pleading jurisprudence in *Twombly* and *Iqbal*. *See, e.g.*, *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1333–35 (Fed. Cir. 2012). Form 18 required only: "(1) an allegation of jurisdiction; (2) a statement that the plaintiff owns the patent; (3) a statement that defendant has been infringing the patent 'by making, selling, and using [the device] embodying the patent'; (4) a statement that the plaintiff has given the defendant notice of its infringement; and (5) a demand for an injunction and damages." *Id.* Accordingly, the Federal Circuit held that "Form 18 and the Federal Rules of Civil Procedure do not require a plaintiff to plead facts establishing that each element of an asserted claim is met" and "a plaintiff need not even identify which claims it asserts are being infringed." *Id.*

However, on December 1, 2015, amendments to the Federal Rules of Civil Procedure abrogated the Appendix of Forms, including Form 18. *Atlas IP LLC v. Pac. Gas & Elec. Co.* ("*PGE*"), No. 15-CV-05469-EDL, 2016 WL 1719545, at *5 (N.D. Cal. Mar. 9, 2016). Under the amended rules, allegations of direct infringement are now subject to the pleading standards established by *Twombly* and *Iqbal*. *Id.*

Under *Twombly* and *Iqbal*, a plaintiff must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 550. Satisfying this obligation "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id*. at 556 n.3. The complaint must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. Indeed, to survive a motion to dismiss, a "complaint must plead enough factual matter that, when taken as true, states a claim to relief that is plausible on its face." *Addiction & Detoxification Inst. L.L.C. v. Carpenter*, 620 F. App'x 934, 936 (Fed. Cir. 2015) (citing *Twombly*, 550 U.S. at 556, 570) (internal quotation marks omitted)). "[T]he plausibility standard . . . asks for more than a sheer possibility that a defendant acted unlawfully." *Iqbal*, 556 U.S. at 678. Thus, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief" and must therefore be dismissed. *Id.* at 679 (internal quotations omitted). A complaint that merely pleads facts that are "consistent with" a defendant's liability "stops short of the line between possibility and plausibility." *Twombly*, 550 U.S. at 556.

Although non-speculative factual allegations are to be accepted as true, the court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678; *id.* at 679 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."*)*. Thus, a reviewing court may begin "by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. Courts must then determine whether the factual allegations in the complaint "plausibly give rise to an entitlement of relief." *Id.*

In the context of direct infringement allegations, a patent infringement complaint must allege more than that a particular product's operation is "consistent with" or renders "possib[le]" infringement; it must contain "some further factual enhancement" or an additional "factually suggestive" allegation that direct infringement is "plausible." *Twombly*, 550 U.S. at 556–57, 557 & n.5. Moreover, to be plausible, a complaint must adequately plead infringement of at least one patent claim. *PGE*, 2016 WL 1719545, at *5. With respect to that "at least" one claim, the complaint must include facts sufficient to show that the defendant plausibly infringes every element of the claim. *Id.* at *4. That is because "factual allegations that do not permit a court to infer that the accused product infringes each element of at least one claim are ***not*** suggestive of infringement—they are merely compatible with infringement." *Exelon*, 2016 WL 2866134, at *5. "Because the failure to practice even a single element is all that separates innovation from infringement, there is always an obvious alternative explanation where a plaintiff does not allege facts about each element." *Id.* Plaintiffs' allegations as to each of the patents fail under these mandates,[2]

[2] Notwithstanding the Supreme Court's abrogation of the Appendix of Forms, a court in this District has suggested that Form 18's barebones standards may still apply to claims of direct infringement. *Hologram USA, Inc. v. Pulse Evolution Corp.*, No. 2:14-cv-0772-GMN-NJK, 2016 WL 199417, at *2 n.1 (D. Nev. Jan. 15, 2016). In a footnote, the court indicated that, despite Form 18's abrogation, the court would analyze the sufficiency of plaintiff's infringement allegations under the requirements "formerly set forth in Form 18." *Id.* As support for this approach, the court cited language in the Advisory Committee notes that the court interpreted as preserving Form 18's standards. *Id.* However, the *Hologram* decision is unhelpful to this Court's analysis for at least two reasons. ***First***, its brief discussion of the viability of Form 18 pleading is entirely dicta. Because the amendments abrogating Form 18 apply only to actions filed on or after December 1, 2015 (absent a showing that it is "just and practicable" to apply them retroactively, which neither party urged), and because the *Hologram* action was filed more than 18 months before the effective date, the amendments had no effect in that case and Form 18's standards necessarily applied. *See* Maitra Decl. Supp. Def.'s Mot. Dismiss ("Maitra Decl.") Ex. A at 2. Consequently, any discussion of the continued viability of Form 18's standards in cases governed by the amendments is *dicta*. Indeed, neither party's briefing even suggested that the Court should apply a different standard in light of the amendments (after all, their case was filed 18 months

as demonstrated both below and in the attached claim charts illustrating the allegations' deficiencies. *See* Maitra Decl. Ex. B.

1. U.S. Patent No. RE39,818

U.S. Patent No. RE39,818 (the "'818 patent"), entitled "Personalized Wireless Video Game System" relates to "wireless control of a video game system" such that the "video game [has] the ability to 'recognize' a user and adjust game operation accordingly." ECF No. 1 at [57] (Abstract). According to the patent, an advantage of the claimed wireless controller is that, unlike wired controllers, a wireless controller "provides a game user the freedom to operate a video game from a greater distance" such that "games can be played on large video screens without the requirement of operating the games from close proximity without requiring long controller cables." *Id*. at 3:15–20; *see also id*. at figs.1 & 2. The patent also explains that the wireless controller may store the user's personal information, such as her age, such that "operation of a video game can be prohibited based on the user age." *Id*. at 3:35–46.

Claim 20 is the only claim of the '818 patent that the complaint purports to map onto Zynga's (unidentified) "social casino games." It recites:

> 20. A game apparatus comprising:
>
> a wireless transmitter to transmit both an identification code and game control signals to a processor executing a game, the identification code is used by the processor to retrieve identification data and authorize game play based at least in part on an age of a player; and
>
> a plurality of input controls to allow the player to interact with the processor to play the game.

Id. at 7:25–33. The complaint fails to allege facts setting forth a plausible infringement claim with respect to numerous elements of Claim 20.

---

before the amendments' effective date), and the court was therefore without the benefit of briefing, much less the now-clear weight of authority, on the issue. ***Second***, the courts that actually have considered the issue have rejected the *Hologram* court's approach (some expressly), and have concluded that the standards enunciated in *Twombly* and *Iqbal* now apply to claims of direct infringement. *See, e.g.*, *Tannerite Sports, LLC v. Jerent Enters., LLC*, No. 6:15-cv-00180-AA, 2016 WL 1737740, at *3 (D. Or. May 2, 2016) (examining and rejecting the *Hologram* dicta); *Exelon*, 2016 WL 2866134, at *5; *PGE*, 2016 WL 1719545, at *2–*4.

First, Claim 20 requires a "***wireless transmitter*** to transmit both an identification code and game control signals to a processor executing a game." *Id*. at 7:25–28. But Zynga is a software company that provides its games to end users without ***any*** accompanying hardware, let alone a "wireless transmitter." Instead, Zynga's games run on mobile devices provided by companies like Apple and Samsung, or on computers made by companies like Dell. Consequently, Zynga necessarily cannot infringe the "wireless transmitter" claim element, nor do plaintiffs' allegations suggest otherwise. Indeed, although the complaint provides nothing more than a conclusory assertion that "Zynga's social casino games meet all requirements of claim 20," including "a game apparatus comprising: a wireless transmitter," coupled with an assortment of unidentified screenshots, if anything, these "allegations" ***confirm*** that Zynga does not infringe this claim element. *See* ECF No. 1 ¶ 22. Specifically, Paragraph 22 of the complaint includes a screenshot from an iPhone bearing a Wi-Fi icon (circled by Zynga below in red), presumably (though plaintiff does not say) to show the presence of a "wireless transmitter":

●●●●○ AT&T
9:58 PM
78%
Back
zynga poker
Zynga Poker - Texas Hol...
12+
Zynga Inc.
Offers In-App Purchases
(741)
Details
Reviews
Related

Setting aside the fact that the screenshot depicts not any Zynga game but a page in ***Apple's*** App Store from which Zynga Poker may be downloaded (and thus necessarily cannot show infringement by ***Zynga***), that Wi-Fi icon reflects the activity of the wireless transmitter of the ***iPhone itself***, rather than any "wireless transmitter" of any Zynga social casino game. In short, not only does the complaint fail to provide any factual allegations sufficient to plausibly show Zynga's infringement of the "wireless transmitter" element, but plaintiffs' own allegations demonstrate that Zynga ***does not*** infringe that claim element.

Second, Claim 20 requires a "processor executing a game" that uses an "identification code . . . to retrieve identification data and authorize game play based at least in part on an age of a player." ECF No. 1-2 at 7:27–30. Other than a conclusory allegation that Zynga's games meet this limitation, *see* ECF No. 1 ¶ 23, the complaint says nothing about whether (much less ***how***) Zynga's games perform ***any*** age-based game play authorization, let alone how a "processor executing a game" allegedly does so using an "identification code." Indeed, the screenshot corresponding to this claim element shows nothing whatsoever about the user's age. *See id.* Nor does the complaint identify ***which*** processor—the processor of the user's computer or mobile device, the processor of a Zynga computer, or some other processor—allegedly meets the processor limitation of the claim. Among other things, Zynga is left to guess: (1) what age authorization mechanism, if any, does plaintiff accuse of infringement?; (2) what processor does plaintiff contend executes a game ***and*** performs the claimed age-based authorization?; and (3) what element of Zynga's games allegedly constitutes the claimed "identification code" transmitted by the "wireless transmitter" and then used by the processor? The complaint doesn't say.

Because the complaint entirely fails to address each of these claim elements—(1) the "wireless transmitter," (2) the "identification code," and (3) the "processor executing a game" that uses "the identification code . . . to retrieve identification data and authorize game play based at least in part on an age of a player"—each of these failures independently requires dismissal of the complaint's '818 infringement allegations. *PGE*, 2016 WL 1719545, at *4 ("Because the complaint entirely fails to address [a] necessary element of claim 1, the claim fails as pled"); *Exelon*, 2016 WL 2866134, at *5 ("[F]actual allegations that do not permit a court to infer that the accused product infringes each element of at least one claim are not suggestive of infringement—they are merely compatible with infringement" and thus fail to state a claim).

2. U.S. Patent No. 7,534,169

U.S. Patent No. 7,534,169 (the "'169 patent"), entitled "System and Method for Wireless Gaming System with User Profiles," is directed to modifying how a gaming activity is presented to a user during a second gaming session based on the user's success during a first gaming session. *See* ECF No. 1-4 ('169 patent) at [57] (Abstract).

Claim 1 is the only claim of the '169 patent that the complaint purports to map onto Zynga's (unidentified) “social casino games.” It recites:

> An apparatus comprising:
>
> at least one processor; and
>
> at least one data storage device electronically coupled to the at least one processor, the at least one data storage device operable to store:
>
> a program, and
>
> at least one profile associated with a user of a gaming device, the gaming device being operable to make a plurality of gaming activities available to the user for play via the gaming device; and
>
> wherein the program, when executed by the at least one processor, makes the at least one processor operable to at least;
>
> update the user's profile to reflect a first success level of the user in playing a first of the plurality of gaming activities via the gaming device during a first gaming session;
>
> in response to a start of a second gaming session that is subsequent to a termination of the first gaming session:
>
> determine from the user's profile at least the first success level of the user in playing the first gaming activity during the first gaming session;
>
> based at least in part on the first success level, modify a gaming environment, wherein the modification includes a change as to how the first gaming activity is presented to the user as a possible gaming activity that the user may play via the gaming device during the second gaming session; and
>
> present to the user, via the gaming device, the first gaming activity according to the modified gaming environment.

Id. at 26:43–27:7.

As with the ’818 patent, the complaint’s allegations regarding the ’169 patent are limited to a formulaic recitation of ***some*** of the claim elements, with occasional unidentified gameplay screenshots. As a threshold matter, the complaint does not even attempt to address multiple elements of the claims, including: (1) the “at least one processor”; (2) the “at least one data storage device electronically coupled to the at least one processor"[3]; and (3) the "gaming device." That is not hyperbole: the complaint literally does not even hint at how Zynga's (unidentified) "social casino games" meet these claim elements. *See* ECF No. 1 ¶¶ 41–50. These failures alone require dismissal of the '169 infringement allegations. *PGE*, 2016 WL 1719545, at *4 ("Because the complaint entirely fails to address [a] necessary element of claim 1, the claim fails as pled").

Plaintiffs' allegations with respect to the claim elements actually referenced in the complaint fare no better. For instance, claim 1 requires "at least one profile associated with a user of a gaming device[.]" ECF No. 1-4 at 26:49–50. But, the complaint identifies nothing in Zynga's accused games that allegedly constitute the claimed "profile," and the complaint's screenshot corresponding to this claim element does not show a profile of any sort. *See* ECF No. 1 ¶ 45. As another example, claim 1 requires that the claimed processor "modify a gaming environment" based "at least in part on [a user's] first success level," wherein "the modification includes a change as to how the first gaming activity is presented to the user as a possible gaming activity that the user may play via the gaming device during the second gaming session." ECF No. 1-4 at 26:66–27:4. But, the screenshot corresponding to this claim limitation—which itself contains multiple discrete elements—simply shows a screen displaying a user's "STATS." Plaintiff makes no attempt to link any of the discrete elements of this limitation to anything depicted in the screenshot (nor does the screenshot, on its face, depict those elements). Which element of Zynga's games constitutes "a first success level?" What in Zynga's games does plaintiff allege constitutes "modifying a gaming environment?" What is the "first gaming activity," and how does plaintiff contend that activity is "presented to the user as a ***possible*** gaming activity," *i.e.*, one that the user ***may*** select, but isn't required to play? The complaint doesn't say.

Moreover, Claim 1 requires that the above "modify[ing]" occur "in response to a start of a second gaming session that is subsequent to a termination of the first gaming session." *Id.* at 26:60–62. What in Zynga's accused games is the "first gaming session?" Does a "gaming session" terminate after a round of poker, after a hand, after all but one player at a table is out of chips, after the user closes the Zynga game application, or at some other time? And, how do Zynga's games plausibly perform the final three steps of claim 1 "***in response to*** a start of a second gaming session" as that claim requires—as opposed to performing those steps ***irrespective of*** whether a second session is started (which would not infringe)? Without answers to each of these questions, there is no factual basis from which the court can infer that Zynga infringes every element of claim 1. Consequently, the complaint's '169 allegations must be dismissed. *Exelon*, 2016 WL 2866134, at *5 ("[F]actual allegations that do not permit a court to infer that the accused product infringes each element of at least one claim are ***not*** suggestive of infringement—they are merely compatible with infringement.").

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[3] Relatedly, Claim 1 requires that the "at least one data storage device" be "operable to store" both a "program" and "at least one profile associated with a user of a gaming device." *Id.* at 26:45–50. Because the complaint contains no factual allegations that plausibly suggest infringement of the "data storage device" element, they also necessarily fail to show that the accused data storage device is "operable to store" both of these required data types.

3. U.S. Patent No. 6,899,628

U.S. Patent No. 6,899,628 (the "'628 patent"), entitled "System and Method for Providing Game Event Management to a User of a Gaming Application," is the first-issued of six related patents asserted by Plaintiff IG Limited (collectively, the "Enhanced Services Patents"). The patent relates to providing "enhanced services," such as (1) game event management; (2) generating statistics; (3) user profiling; (4) matching users in an "intelligent lobby"; (5) providing game advice; and (6) placing and settling wagers. ECF No. 1-4 ('628 patent) at 3:15–28. Each of the claims called out in the complaint require a networked architecture including client devices, a server for managing game events, and an enhanced services platform remote from the server. *See id.* at fig.1 & claim 31.

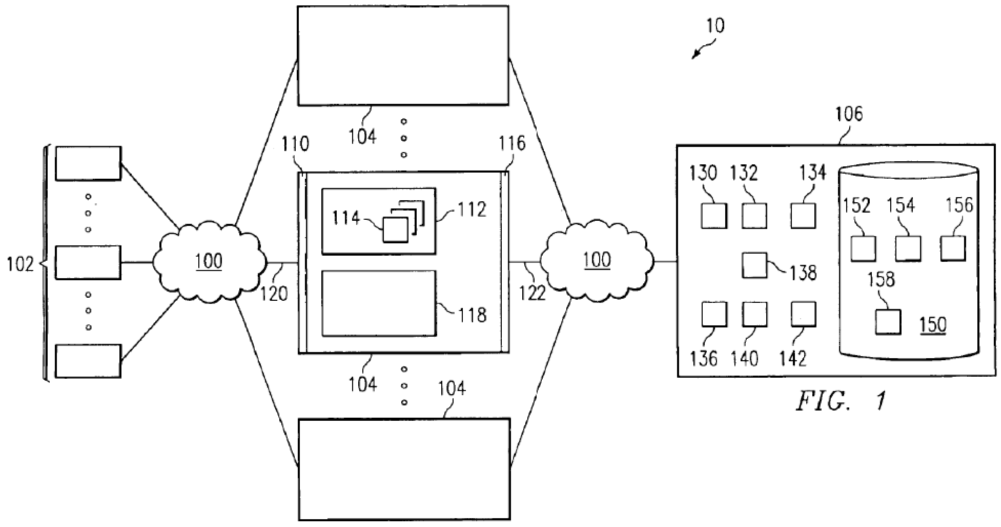

FIG. 1

Claim 31 is the only claim of the '628 patent that the complaint purports to map onto Zynga's (unidentified) "social casino games." It recites:

> 31. A server for managing game events, comprising:
>
> > a processor that executes a gaming application that is accessed by a remote user via a network;
> >
> > a monitor module coupled to the processor that monitors a plurality of game events during the execution of the gaming application by the user; and
> >
> > an interface coupled to the processor that communicates event information associated with at least one of the game events to an enhanced services platform remote from the server such that the platform may generate a wager record associated with a wager between a plurality of users based on at least one of the first event information and the second event information.

Id. at 23:62–24:7. Thus, the claim requires a networked architecture including: (1) a "***server*** for managing game events," which itself has three distinct elements (a) "a ***processor*** that executes a gaming application" accessed by a "remote user via a network," (b) "a ***monitor module*** coupled to" that processor, and (c) "an ***interface*** coupled to the processor"; and (2) an "***enhanced services platform*** remote from the server." Beyond a conclusory assertion that "Zynga's social casino games meet all requirements of claim 31," however, the complaint contains no factual allegations whatsoever that would permit the Court to infer that each of these five separate structural elements plausibly exist in the accused system in the configuration required by the claims. *See* ECF No. 1 ¶¶ 34–36.

As just a few examples, screenshots of gameplay simply cannot support the plausible inference that: (1) the (unidentified) accused gaming application is executed by a processor on a "server for managing game events" (rather than, for example, exclusively on the user's iPhone); (2) that there is a "monitor module" component of the server that is "coupled to" the processor executing the game, and which "monitors a plurality of game events during the execution of the gaming application"; (3) that there is another component of the server—an "interface"—that is coupled to the processor and which "communicates game event information . . . to an enhanced services platform"; or (4) that Zynga's (unidentified) accused system includes "an enhanced services platform ***remote from the server***" that "generate[s] a wager record associated with a wager between a plurality of users" (rather than, for example, simply generating any wager record ***locally*** at any "server for managing game events" itself). Because the factual allegations of the complaint fail to address numerous elements of claim 31, the '628 allegations must be dismissed. *PGE*, 2016 WL 1719545, at *4.

4. U.S. Patent No. 6,966,832

U.S. Patent No. 6,966,832 (the "'832 patent"), entitled "System and Method for Providing Game Advice to a User of a Gaming Application" is the next-issued in the series of Enhanced Services patents and shares its specification with the '628 patent. Claim 1 is the only claim of the '832 patent that the complaint purports to map onto Zynga's (unidentified) "social casino games." It recites:

> 1. A system for providing game advice to a user of a gaming application, comprising:
>
> a server that:
>
> executes a gaming application;
>
> monitors a plurality of game events during the execution of the gaming application; and
>
> communicates event information associated with at least one game event; and
>
> a processor remotely coupled to the server that:
>
> receives the event information;
>
> generates game advice associated with the gaming application based at least in part upon the event information, wherein the game advice comprises wager advice that is base [*sic*] at least in part upon event information associated with an opponent of the user in the gaming application; and
>
> presents the game advice to the user during the execution of the gaming application

ECF No. 1-9 ('832 patent) at 20:26–43.

As with the '628 patent, the complaint's '832 allegations contain no facts from which the Court could infer that any accused Zynga system involves a server that performs each of the claimed functions (*i.e.*, "executes . . . ," "monitors . . . ," and "communicates . . ."). Instead, the gameplay screenshots are equally consistent with, for example, a scenario in which the user's own iPhone—rather than some remote server—performs each of these functions, or yet another scenario in which the user's iPhone performs some of those functions, while a server performs others. *See Twombly*, 550 U.S. at 557 (holding that a complaint that merely pleads facts that are "consistent with" a defendant's liability "stops short of the line between possibility and plausibility"). The complaint's '628 allegations therefore fail to state a claim for this reason alone. *PGE*, 2016 WL 1719545, at *4.

That is not all. As another example, Claim 1 requires a "processor remotely coupled to a server" that "***generates game advice*** associated with the gaming application based at least in part upon the event information, wherein the game advice comprises wager advice that is base[d] at least in part upon event information ***associated with an opponent of the user in the gaming application***." ECF No. 1-9 at 20:34–41. The complaint contains no allegations (or even screenshots) supporting an inference that, in Zynga's (unidentified) accused system, a "processor remotely coupled to a server . . . generates game advice," let alone that any such advice is based on "event information associated with ***an opponent*** of the user." *See* ECF No. 1 ¶¶ 101–112. The complaint's '628 allegations thus fail to state a claim for this additional reason as well. *PGE*, 2016 WL 1719545, at *4.

5. U.S. Patent No. 6,979,267

U.S. Patent No. 6,979,267 (the "'267 patent"), entitled "System and Method for Generating Profile Information for a User of a Gaming Application," is another of the Enhanced Services patents. Claim 1 is the only claim of the '267 patent that the complaint purports to map onto Zynga's (unidentified) "social casino games." It recites:

1. A system for generating profile information for users of gaming applications, comprising:

a server that:

executes a first gaming application;

monitors a plurality of game events during the execution of the first gaming application by a first user;

communicates first event information associated with a first game event;

communicates second event information associated with a second game event; and

a processor remotely coupled to the server that:

[a] receives the first event information;

[b]receives the second event information;

[c] generates first profile information associated with the first user based at least in part upon the first event information, the second event information and wager records of the first user;

[d] receives third event information substantially simultaneously with the first event information, the third event information associated with a third game event, wherein the third game event is associated with the execution by a second user of a second gaming application;

> [e] receives fourth event information associated with a fourth game event, wherein the fourth game event is associated with the execution by the second user of the second gaming application; and
>
> [f] generates second profile information associated with the second user based at least in part upon the third event information and the fourth event information; and
>
> a memory coupled to the processor that stores the first profile information.

ECF No. 1-5 ('267 patent) at 20:23–55.

Like claim 31 of the '832 patent, this claim also requires a server that performs multiple claimed functions (*i.e.*, "executes . . . ," "monitors . . . ," and "communicates . . ."), yet the complaint's allegations contain no facts from which the Court could infer that any accused Zynga system involves such a server. The complaint's '267 allegations therefore fail to state a claim for this reason alone. *See supra* § II.B.4; *PGE*, 2016 WL 1719545, at *4.

Claim 1 of the '267 patent also requires "a processor remotely coupled to the server that" performs five additional functions, labeled [a]–[f] above. But, the complaint sets forth no facts sufficient to support an inference that some processor in Zynga's system distinct from that of the server performs all five of these steps. Instead, the complaint's screenshots suggest only that ***some*** processor (or combination of processors) "generates first profile information associated with the first user" and second profile information associated with a second user. But, at best for plaintiff, that is only ***consistent*** with the notion that the system depicted in the screenshots meets ***some*** of elements [a]–[f]; the screenshots, however, are equally consistent with ***no*** infringement because the profiles depicted therein alternatively could have been generated: (1) by the server (and thus, not by a "processor ***remotely coupled***" to the server); or (2) some combination of processors, none of which perform all five functions, and only one of which is remote from the server (*e.g.*, the processor of the user's iPhone). And, significantly, none of the screenshots or their accompanying text support an inference that any processor of the accused system "receives third event information ***substantially simultaneously*** with the first event information," as required by element [d] above. This failure alone is fatal to the '267 infringement allegations. *PGE*, 2016 WL 1719545, at *4 ("Because the complaint entirely fails to address [a] necessary element of claim 1, the claim fails as pled").

6. U.S. Patent No. 7,029,394

U.S. Patent No. 7,029,394 (the "'394 patent"), entitled "System and Method for Generating Statistics for a User of a Gaming Application," is another of the Enhanced Services patents. Claim 1 is the only claim of the '267 patent that the complaint purports to map onto Zynga's (unidentified) "social casino games." It recites:

> 1. A system for generating statistics information, comprising:
>
> a server that:
>
> executes a gaming application;
>
> monitors a plurality of game events during the execution of the gaming application by a user;
>
> communicates first event information associated with a first game event; and
>
> communicates second event information associated with a second game event;
>
> a processor remotely coupled to the server that:
>
> [a] receives the first event information;
>
> [b]receives the second event information;
>
> [c] generates statistics information based at least in part upon the first event information, the second event information and wager records associated with the gaming application; and
>
> [d] determines an outcome of a wager associated with the gaming application using the statistics information; and
>
> a memory coupled to the processor that stores the statistics information.

ECF No. 1-7 ('394 patent) at 20:45–67.

Like claim 31 of the '832 patent and claim 1 of the '297 patent, this claim also requires a server that performs multiple claimed functions (*i.e.*, "executes . . . ," "monitors . . . ," and "communicates . . ."). The complaint's allegations, however, contain no facts from which the Court could infer that any accused Zynga system involves such a server. The complaint's '394 infringement allegations therefore fail to state a claim for this reason alone. *See supra* § II.B.4; *PGE*, 2016 WL 1719545, at *4.

In addition, claim 1 of the ’297 patent requires a “processor remotely coupled to a server” that, among other things, “generates statistics information . . .” and “determines an outcome of a wager . . . using the statistics information.” ECF No. 1-7 at 20:56–64. Yet the complaint contains no factual allegations supporting an inference that the accused Zynga system plausibly includes a processor ***other than the processor of the server*** that performs these two functions, as the claim requires. *See id.* (requiring that these functions be performed by “a processor remotely coupled to the server”). Each of these additional shortcomings provides an independent basis for dismissing the complaint’s ’297 infringement claims.

7. U.S. Patent No. 8,342,924

U.S. Patent No. 8,342,924 (the “’924 patent”), entitled “System and Method for Providing Enhanced Services to a User of a Gaming Application,” is yet another of the Enhanced Services patents. Claim 11 is the only claim of the ’924 patent that the complaint purports to map onto Zynga’s (unidentified) “social casino games.” It recites:

> 11. An apparatus comprising:
>
> at least one processor; and
>
> at least one memory device electronically coupled to the at least one processor, wherein the at least one memory device stores instructions which, when executed by the at least one processor, direct the at least one processor to:
>
> [a] receive information associated with at least one event initiated by a user within a context of playing a game, wherein the information is received during the playing of the game by the user;
>
> [b] based at least in part on the information, generate statistics information, wherein the statistics information is associated with the user with respect to the playing of the game; and
>
> [c] cause to be electronically displayed to another user at least the statistics information.

ECF No. 1-6 at 21:4–19.

Thus, elements [a]–[c] collectively require that the “at least one processor” “generate statistics information” (element [b]) and “cause [that statistics information] to be electronically displayed to another user” (element [c]) where that statistics information is “based at least in part” on “information received during the playing of the game by the user” (element [a]).

The complaint does not even identify a "processor," let alone state facts sufficient to support a plausible inference that a Zynga processor generates and causes the display of statistics information based on information "received [by the processor] during the playing of the game," as claim 11 requires. *See* ECF No. 1-6 at 21:10–13. Instead, the complaint's screenshots show only the ***results*** displayed on a user's "STATS" page, without any indication of whether the "information" on which any "statistics information" is based was received by a statistics-generating processor ***during*** gameplay, as claim 11 requires (as opposed to after gameplay ends). Such allegations, while perhaps "consistent with" infringement, "stop[] short of the line between possibility and plausibility" and therefore fail to state a claim. *Twombly*, 550 U.S. at 556. For at least these reasons, the complaint's '924 infringement allegations should be dismissed.

8. U.S. Patent No. 9,111,417

U.S. Patent No. 9,111,417 (the "'417 patent"), entitled "System and Method for Providing Enhanced Services to a User of a Gaming Application," is yet another of the Enhanced Services patents. Claim 1 is the only claim of the '417 patent that the complaint purports to map onto Zynga's (unidentified) "social casino games." It recites:

> 1. A system comprising at least one processor and at least one non-volatile memory having software stored thereon that when executed by the at least one processor directs the at least one processor to:
>
> > [a] provide a game via a communications network to users via respective computing devices of the users, wherein the game is a sports game, an arcade game, a card game, or an adventure game;
> >
> > [b] responsive to a request from one of the users, cause a graphical user interface to be presented to the user at the user's computing device, wherein the graphical user interface allows the user to offer a wager to other users;
> >
> > [c] responsive to presenting the graphical user interface to the user, receive from that user a request to generate a wager offer, wherein the wager offer includes a wager amount;
> >
> > [d] responsive to receiving the request to generate the wager offer, present the wager offer to other users via respective computing devices of the other users;
> >
> > [e] receive from a plurality of the other users an acceptance of the wager offer, each acceptance at the wager amount;
> >
> > [f] during a playing of the game by a plurality of the users:
> >
> > [g] generate statistics information related to at least a first and a second of the users playing the game;

> [h] cause at least a portion of the statistics information of the first user to be presented to the second user via a respective computing device of the second user; and
>
> [i] cause at least a portion of the statistics information of the second user to be presented via a respective computing device of the first user; and
>
> [j] at end of the game, determine an outcome of the wagers resulting from the users that accepted the wager offer, wherein to determine the outcome of the wagers includes to transfer funds to at least one user who played the game.

ECF No. 1-8 ('417 patent) at 20:20–53.

As with the remaining patents, the complaint's infringement allegations are limited to a formulaic recitation of the claim elements, coupled with unidentified screenshots. And, just as elsewhere, the '417 allegations fail to actually state facts sufficient to support an inference that an accused Zynga game meets every limitation of claim 1. As just one example, none of the allegations support a plausible inference that any accused Zynga game includes a processor that "[e] receives[] from a plurality of the other users an acceptance of the wager offer, each acceptance ***at the wager amount***." ECF No. 1-8 at 20:38–39. As another example, no allegations support a plausible inference that the processor "generates statistics information" relating to respective users, and causing that information to be presented to each of a first a second user as elements ***during a playing of a game***," as elements [f]–[i] require (as distinct from, for example, causing such statistics information to be generated ***or*** presented ***after*** the end of a game). For at least these reasons, the complaint's '924 infringement allegations fail to state a claim and must be dismissed.

9. Plaintiffs' Failure to Identify Any Actual Games That Allegedly Infringe Alone Warrants Dismissal

Plaintiffs' complaint does not specify a single Zynga game that allegedly infringes plaintiffs' patents. Instead, plaintiffs assert only that unidentified "Zynga social casino games" on unidentified platforms—the complaint doesn't say whether it's Android, iOS, or web games, each of which have distinct architectures—infringe all eight patents. Such generic assertions of infringement fail to put a defendant on notice of which of its products actually are alleged to infringe and thus fail to state a claim.

This precise issue was addressed in *McRO, Inc. v. Disney Interactive Studios, Inc.*, No. 12-cv-10333-GW (C.D. Cal. Mar. 4, 2013), ECF No. 36 (attached to Maitra Declaration as Exhibit C). There, the plaintiff categorically accused defendants' "computer and/or video games" that involve "methods for automatically animating lip synchronization and facial expression," just as plaintiffs here categorically accuse Zynga's "social casino games." *Id.* at 3. Defendants moved to dismiss for failure to state a claim, arguing that such a generic identification of the accused products fails to provide fair notice of which specific games actually are alleged to infringe. *Id.* The court agreed, holding that plaintiff's categorical identification of accused products failed ***even under Form 18's more lenient pleading standards***. *Id.* at 4–6. Specifically, because plaintiff did not contend that its inventions "cover ***all*** methods related to synchronization of facial expressions," and "because Defendants produce a large number of video and/or computer games which may employ a variety of techniques to synchronize the facial expressions" of game "characters (some possible covered by Plaintiff's patents, some not), it [was] impossible for Defendants to be on fair notice" of which games or specific categories of games infringe. *Id.* at 6. The same is true here. Because plaintiffs do not allege that the asserted patents cover ***every*** "social casino game[]" ever made, their generic assertion that unspecified Zynga "social casino games" infringe the asserted patents is not sufficient to put Zynga on fair notice of which of its social casino games plaintiffs actually believe infringe. *See id.* ("Without a more detailed description of the allegedly infringing products, Defendants cannot fairly ascertain which of their different implementations of the lip synchronization and facial animation technologies are--the 'accused products' described in Plaintiff's Complaints."). Consequently, plaintiffs' direct infringement allegations should be dismissed for this reason alone.

Indeed, prior to filing a patent complaint, an attorney is obligated to form a reasonable belief "based on some actual evidence uncovered during the prefiling investigation, that each claim limitation reads on ***the accused device*** either literally or under the doctrine of equivalents." *Antonious v. Spalding & Evenflo Cos.*, 275 F.3d 1066, 1074 (Fed. Cir. 2002). As such, plaintiffs presumably should have no trouble identifying which of Zynga's specific products they actually believe infringe based on their pre-filing mapping of the patent claims to the allegedly infringing products on an element-by-element basis.

B. Plaintiffs' Indirect Infringement Allegations Fail to State a Claim

The complaint also includes claims under 35 U.S.C. § 271(b) and § 271(c) for induced infringement and contributory infringement, respectively. ECF No. 1 at Prayer For Relief ¶ 1. Those claims likewise should be dismissed because the complaint is devoid of factual assertions that plausibly support either claim.

To establish induced infringement, a patent owner must show that the defendant specifically induced others to act in a manner that would infringe and had "knowledge that the induced acts constitute patent infringement." *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011). Thus, "a claim for induced infringement cannot survive a motion to dismiss without facts that plausibly establish that the accused infringer 'specifically intended [its] customers to infringe the [asserted] patent and knew that the customer's acts constituted infringement.'" *Silver State Intellectual Techs., Inc. v. FourSquare Labs, Inc.*, No. 2:12-cv-01308-GMN-PAL, 2013 WL 5437363, at *4 (D. Nev. Sep. 26, 2013) (quoting *Bill of Lading*, 681 F.3d at 1339).

To establish contributory infringement, a patent owner must demonstrate that: (1) the accused infringer sold, offered to sell, or imported a material or apparatus for use in practicing a patented process, or which is a component of a patented system or apparatus; and (2) that the "material or apparatus" is (a) material to practicing the invention, (b) has no substantial non-infringing uses, and (c) is known by the accused infringer "to be especially made or especially adapted for use in an infringement of such patent." Thus, to survive a motion to dismiss, a contributory infringement claim requires factual allegations sufficient to show "that the alleged contributory infringer knew that the combination for which his component was especially designed was ***both*** patented and infringing." *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488 (1964); *Bill of Lading*, 681 F.3d at 1337. Additionally, a plaintiff alleging contributory infringement must "plead facts that allow an inference that the components sold or offered for sale have no substantial non-infringing uses." *Bill of Lading*, 681 F.3d at 1337. Finally, "[b]ecause liability for indirect infringement of a patent requires direct infringement," plaintiffs' inducement and contributory infringement claims each require "plausibl[e] alleg[ations] that the . . . patent was directly infringed [by someone other than defendant] to survive [a] motion to dismiss." *Id.* at 1333.

Plaintiffs' indirect infringement allegations fall far short of these requirements. Indeed, although plaintiffs' prayer for relief requests a declaration of infringement under the sections of the patent act relating to inducement and contributory infringement, *see* ECF No. 1 at 31 (requesting a declaration of infringement under 35 U.S.C. §§ 271(b) & (c)), the complaint does not even attempt to set forth facts sufficient to satisfy the elements of either an inducement or contributory infringement claim. Indeed, the only allegations that come close to even a hint of some form of indirect infringement are plaintiffs' formulaic recitations, for each of the asserted patents, that "Defendant, directly ***or through its agents, customers, and/or intermediaries***, has made, used, tested, imported, provided, supplied, distributed, sold, and/or offered for sale products and/or systems that infringe (either directly or under the doctrine of equivalents) one or more claims of" the patents at issue. *See, e.g.*, ECF No. 1 ¶ 20. But, the complaint alleges no actual facts showing that any of Zynga's "agents, customers, and/or intermediaries" in fact perform every step of the asserted claims, as is required for the direct infringement predicate of any indirect infringement claim. *See Exelon*, 2016 WL 2866134, at *5 (citing *Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed. Cir. 1995) (holding that direct infringement requires a showing that each limitation set forth in a claim be found in the accused product or process, either literally or equivalently)). Plaintiffs' inducement and contributory infringement claims thus fail to state a claim because they allege no facts showing that the asserted patents are directly infringed by another party. *Bill of Lading*, 681 F.3d at 1333.

Plaintiffs also fail to address multiple additional elements of their indirect infringement claims, all of which are fatal to the claims' survival on a motion to dismiss. For instance, with respect to inducement, the complaint is devoid of factual allegations showing that Zynga: (1) took actions to encourage infringement of another party, (2) while specifically intending that the party infringe the asserted patent(s), and (3) and with knowledge that parties' actions constitute infringement. *FourSquare*, 2013 WL 5437363, at *4. Thus, plaintiffs' inducement allegations fall short of even the conclusory allegations this Court rejected in *FourSquare* and must be dismissed as a matter of law. *See id*. The same is true of plaintiffs' contributory infringement claims, which fail to allege the following essential elements of such a claim: (1) that Zynga "knew that the combination for which his component was especially designed was both patented and infringing"; and (2) that "the components sold or offered for sale" by Zynga "have no substantial non-infringing uses." *Aro*, 377 U.S. at 488; *Bill of Lading*, 681 F.3d at 1337. Thus, just like the inducement claims, plaintiffs' contributory infringement claims must be dismissed.

C. Plaintiffs' Willful Infringement Allegations Fail to State a Claim

The plaintiffs' willful infringement allegations likewise fail to state a claim. In addition to a predicate showing of infringement, willful infringement requires: (1) an objectively high likelihood that the accused infringer's activities constituted infringement of a valid patent—*i.e.*, that the accused infringer's actions were objectively reckless; and (2) that the accused infringer subjectively knew of the risk of infringement, or the risk of infringement was so obvious, the accused infringer should have known of the risk. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007). Moreover, because "a willful infringement claim asserted 'in the original complaint must necessarily be grounded exclusively in the accused infringer's pre-filing conduct,'" such a willfulness claim necessarily fails under 12(b)(6) "where the defendant's only alleged basis for knowing of the patents-in-suit is the filing of the action itself." *Word to Info, Inc. v. Google, Inc.*, --- F. Supp. 3d ---, No. 15-cv-03486-WHO, 2015 WL 6126472, at *3 (N.D. Cal. Oct. 19, 2015) (quoting and citing cases).

With respect to four of the asserted patents—the '628, '169, '394, and '417—plaintiffs do not allege that Zynga had ***any*** pre-suit knowledge of the patents. Instead, they allege only that Zynga was "made aware of the '628, '169, '394, and '417 patents as early as the filing of this lawsuit." ECF No. 1 ¶ 114. This "absence of any allegation of pre-filing knowledge of the patents is fatal to [a] willful infringement claim[]." *Word to Info*, 2015 WL 6126472, at *3 (quoting another source). With respect to the remaining elements of a willfulness claim, the complaint states, as to every asserted patent, only that Zynga "has acted and is continuing to act in the face of an objectively high likelihood that its actions constitute infringement of a valid patent or with reckless disregard of that likelihood." ECF No. 1 ¶ 115. Such "formulaic recitation of the elements" of a claim necessarily fail under *Twombly*. *See Twombly*, 550 U.S. at 555; *see U.S. Ethernet Innovations v. Cirrus Logic, Inc.*, No. 6:12cv366 MHS-JDL, 2013 WL 8482270, at *5 (E.D. Tex. Mar. 6, 2013) (dismissing willfulness allegation where "[the] allegation is devoid of any facts that create an inference of [defendant's] objective recklessness; it only makes the conclusory assertion that [defendant] had knowledge of the asserted patents and continued to infringe."). Plaintiffs' willfulness claims should therefore be dismissed.

/ / /

/ / /

III. CONCLUSION

For the foregoing reasons, plaintiffs' complaint should be dismissed in its entirety.

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MARQUIS AURBACH COFFING

By: */s/ Brian R. Hardy, Esq.*

BRIAN R. HARDY, Nevada Bar No. 10068
bhardy@maclaw.com
10001 Park Run Drive
Las Vegas, NV 89145
Telephone: 702-207-6096
Facsimile: 702-856-8908

DURIE TANGRI LLP
SONALI D. MAITRA
California Bar No. 254896 (*Pro Hac Vice to be submitted*)
smaitra@durietangri.com
TIMOTHY C. SAULSBURY
California Bar No. 281434 (*Pro Hac Vice to be submitted*)
tsaulsbury@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendant
ZYNGA INC.

CERTIFICATE OF SERVICE

I certify that all counsel of record is being served on June 13, 2016 with a copy of this document via the Court's CM/ECF system.

/s/ Brian R. Hardy
BRIAN HARDY